United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/755
2 August 1996

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 775

Case No. 836: MIKHAYLIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 20 December 1994, Alexandre Mikhaylin, a former staff member of the United Nations, filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 31 January 1995, the Applicant, after making the necessary corrections, again filed an application in which he requested the Tribunal:

"(a) *To rescind* the decision ... to delete the [Applicant's] entitlement to dependency allowance for [his] child Arthur;

(b) *To order* the Applicant's immediate repayment of dependency allowance in amount of $2,430.89;

(c) *To find and rule* that the decision of the Respondent to delete the entitlement to dependency allowance was flawed by the intrusion of prejudice, discrimination and other extraneous factors and marred by irregularities in procedure;

(d) *To award* the Applicant, as cost, an additional compensation sum of $5,000.00 for legal expenses and actual, consequential and moral damages suffered by the Applicant ...".

Whereas the Respondent filed his answer on 6 March 1995;

Whereas the Applicant filed written observations on 31 July 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 October 1989, on a two-year fixed-term appointment as a translator at the P-3 level, in the Russian Service of the Translation Division of the Department of Conference Services. He had been seconded from the Government of the Union of Soviet Socialist Republics (USSR). His appointment was extended several times on a fixed-term basis until 31 January 1992, the date of his separation from the Organization.

A Personnel Action Form dated 24 October 1989, which contains information concerning the Applicant's recruitment, indicates that the Applicant's dependants were spouse Antonina and child Arthur, but that the dependants' dates of birth and marital status remained to be verified.

On 1 December 1989, the Applicant requested the payment of dependency benefits for his stepson and certified that his stepson was living with him and that he supported him. The Applicant subsequently submitted a letter from the Embassy of the USSR, dated 18 December 1989, certifying that the child was his dependant. In a memorandum dated 11 January 1990, the Officer-in-Charge of the Allowances and Benefits Unit requested the Applicant to submit a number of documents, namely, the child's birth certificate, an affidavit from the Applicant's spouse, and the divorce decree indicating the provisions made for the support of the child. The Officer-in-Charge of the Allowances and Benefits Unit added: "Once the above requested is submitted, your dependency status will be reviewed." These documents were never submitted.

On 25 November 1991, the Applicant requested the Chief of the Allowances and Benefits Unit to stop dependency payments for his wife and stepson. The Administration continued to make dependency allowance payments for the Applicant's wife and stepson until 14 April 1992. On that date, the Chief of the Separations Sub-Unit/Payroll of the Accounts Division informed the Applicant that he had received an overpayment of $2,430.89. She added: "This represents the recovery of the dependency allowance paid to you on behalf of your child Arthur for whom the entitlement was never established." The Chief of the Sub-Unit requested the Applicant to repay that sum. On 9 September 1992, the amount of the overpayment was deducted from the Applicant's repatriation grant.

On 22 October 1992, the Applicant wrote a letter to the Chief of the Separations Sub-Unit/Payroll of the Accounts Division protesting against the deduction of the dependency allowance from his terminal emoluments, a deduction that he termed "an outrageous mistake because my stepson Arthur under the age of 18 years resided with me during all the length of my contract without interruptions, and I provided main and continuing support for him". He pointed out that he had submitted "all the necessary evidence of the dependency" and requested that this "mistake" be rectified.

In a letter dated 31 December 1992, the Officer-in-Charge of the Allowances and Benefits Unit informed the Applicant that the decision would be upheld unless he submitted the evidence requested on 11 January 1990, in which case "the entitlement ... could be established, retroactively". The Officer-in-Charge noted that "the letter of the Embassy of the USSR dated 28 October 1989, did not provide the above-mentioned required documentary evidence sufficient to entitle you to a dependency allowance on behalf of your stepson".

On 10 September 1993, the Applicant requested a review of the decision "to delete his entitlement to dependency allowance" for his stepson. On 15 November 1993, he submitted a statement of appeal to the Joint Appeals Board (JAB). The Board adopted its report on 19 August 1994. Its considerations, recommendations and observations read, in part, as follows:

"*Considerations and Recommendations*

...

17. The Panel noted that even if one accepted Appellant's argument that the decision to be reviewed was that of 9 September 1992, when the United Nations deducted from his terminal emoluments the sum paid to him as child's allowance, his request for review, dated 10 September 1993, was ten months too late.

18. This being so, the Panel then examined whether there were 'exceptional circumstances' which warranted the waiver by the Panel of the time-limits, in accordance with paragraph (f) of rule 111.2. The Panel noted that while the number of administrative errors in connection with the payment and subsequent deduction of the benefit for Appellant's step-child might have excused the failure on the part of the Appellant to abide by time-limits because of the confusion caused thereby, the Appellant did not allege that this was the reason for his failure to do so.

19. The only explanation advanced by the Appellant to justify the delay is contained in his request for administrative review, submitted on 10 September 1993. He states that the reason for the late submission is that he wanted to 'avoid messing up due process' in connection with another appeal he had submitted, which was then pending before the JAB.

20. However, when the Appellant eventually requested an administrative review of the decision regarding the child's allowance, the other case was still pending. He was informed of the JAB having completed its consideration of that appeal on 17 December 1993 and of the final decision thereon by the Secretary-General on 19 April 1994. The Panel therefore found that there were no exceptional circumstances present to justify waiver of the time-limits under Art. 111.2 in this case. The Panel unanimously held that the appeal was therefore not receivable.

General Observations

21. While the Panel disposed of the appeal on procedural grounds, the Panel nevertheless wishes to offer some general comments in respect of the case. The Panel noted the lack of clarity regarding the procedures for claiming the allowance, such as the original 'certification' of entitlement by the staff member, the subsequent discretionary request to provide proof of dependency, the absence of provisions dealing with the effect of failure to supply such proof on payments made prior to the request, etc. Also, the nature of the proof required should be detailed in the rules or

in an administrative instruction, which should also provide for acceptable alternatives to the normal evidentiary documentation in cases where that is not obtainable."

On 31 January 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The contested administrative decision was executed nine months after the Applicant's separation. Since the Applicant was no longer at the United Nations, he had not been properly advised of the time-limits and case handling.

2. The Applicant had another case pending before the JAB, and the Administration had shown readiness for negotiations. The Administration had acknowledged a number of mistakes which had borne heavily on the outcome of the case.

3. The JAB had noted the lack of clarity regarding the procedures for claiming the allowance.

Whereas the Respondent's principal contention is:

The appeal is time-barred and the JAB properly exercised its discretion in not recommending that the time-limit be waived.

The Tribunal, having deliberated from 11 July to 2 August 1996, pronounces the following judgement:

I. The Applicant, a national of the Union of Soviet Socialist Republics, worked as a translator at the United Nations from 8 October 1989 to 31 January 1992.

II. During his service, the Applicant received a dependency allowance for his stepson Arthur. However, the Administration considered that the Applicant had not provided evidence that his stepson was living with him and that he supported him. Consequently, the Administration deducted from his repatriation grant the sum of $2,430.89, which had been paid to him as a dependency allowance. This is the disputed matter that he submitted to the Tribunal.

III. In his application, the Applicant requests the Tribunal to rescind the afore-mentioned decision and to order the repayment to him of the deducted amount, and to rule that the decision taken was flawed by prejudice, discrimination, procedural irregularities and other extraneous factors. He therefore requests the Tribunal to award him an additional sum of $5,000 for expenses and moral damages.

The Respondent maintains that the appeal is time-barred and the JAB properly exercised its discretion in not recommending that the time-limit be waived.

IV. The Tribunal notes that the decision to deduct the overpayment was taken on 14 April 1992. The decision was made known to the Applicant on that date, although it was not executed until 9 September 1992. The Applicant filed an appeal against that decision on 10 September 1993 although, under the provisions of staff rule 111.2 (a), such an appeal must be made within two months from the date of notification of the contested administrative decision.

V. The Tribunal endorses the opinion of the JAB. It considers that this appeal was time-barred. There were no exceptional circumstances present to warrant the waiver of the time-limit for the Applicant, although he stated that he had not filed an appeal in order not to interfere with the consideration of another appeal he had filed, which was pending before the Board.

The Tribunal considers, moreover, that the Board had the discretionary power to take such a decision in the circumstances of the case, subject to review by the Tribunal.

VI. For these reasons, the Tribunal declares the application inadmissible and rejects all pleas.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 2 August 1996

Maria VICIEN-MILBURN
Executive Secretary